

- (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
- (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit.

The District filed its Answer on January 30, 1991. The Association's Reply to New Matter was filed on February 7, 1991. A hearing was held to establish the factual basis for this complaint on April 15, 1991. The parties agreed to brief the legal issues and the final brief was received on June 24, 1991.

FACTS

The Board of Education of the Cape Henlopen School District and the Cape Henlopen Education Association are parties to a three year collective bargaining agreement, which term extends from July 1, 1989, through June 30, 1992.

On or about August 16, 1990, the District adopted Board Policy 124, Extra Duty Positions, under the Programs section of its policy manual. This Policy states:

Extra duty positions must be approved by the Board.

All contracts for extra duty positions will end in June of each year unless another time is specified.

Any employee desiring to have his/her extra duty contract renewed must formally reapply within 30 days from the date the contract expires. Board action will be taken on contract renewals within 60 days from the end of the contract period.

Attached to the Policy as it was distributed to employees was a form entitled Cape Henlopen School District Extra Duty Form. This application form provided space for employees to enter information on the authorized activity applied for including the position, the location of the activity, and its duration, and personal information including employee name, social security number, school assignment and years of experience in any similar extra duty position (with a maximum of three years specified). Above the signature line, the form includes a Condition of Extra Duty Employment statement which provides:

I confirm that all items listed above have been discussed with me, and that I understand that (1) under Delaware law, only the Board of Education has the authority to appoint District employees and that my employment is subject to the Board's approval; (2) in the event the position is discontinued for any reason, the District has no further obligation to me other than to compensate me for any prior service which will be determined on a pro rata basis; (3) I may be dismissed for just cause during the period of this contract.

Board Policy 503, Employment of Coaches, was included in the Board's Policy Manual prior to the adoption of Policy 124 and continues to be included at all times relevant to this dispute. Under the policy section entitled Classified Employees, Policy 503 provides:

The Board recognizes the value of a program of interscholastic athletics as an integral part of the total school experience to all students of the district and to the community.

Hiring of Coaches:

1) Any time there is a need for a coaching position, the athletic director will contact the personnel office to write up the vacancy notice. All notices will be sent to the schools from the personnel office.

2) The vacancy notice will be posted in each district school at least fifteen (15) days prior to the closing date. One copy to the CHEA president.

3) Before the interviewing, the personnel office will notify the principal of the school where the candidate is employed.

4) Each candidate will receive notification that their application was received.

5) All candidates will be interviewed by the athletic director, building administrator and the head coach of the sport in the building involved unless the candidate holds one of the interviewing positions, in which case that individual would not participate in the selection of the new coach.

6) Before any candidate is selected, the Supervisor of Personnel will contact the administrator of the school where said candidate is employed.

7) Once the candidate is selected, the superintendent will recommend the candidate to the Board for approval unless time constraints dictate otherwise.

8) When there is agreement with all parties involved, the name of the coach will be posted through the regular school board minutes. The successful candidate will be informed by the personnel office and a letter sent. All other candidates will be informed by letter.

9) All exceptions to the above hiring procedure must be cleared by the superintendent.

Testimony and evidence received at the hearing established that prior to the adoption of Policy 124, incumbents in extra duty positions indicated on a form entitled Activity Summary and Critique their willingness to continue as a head coach or activity sponsor by checking a box on the form, which also required an inventory accounting at the close of the activity, a listing of equipment needs for the following year and suggestions for improvements in the program. This Summary was due three weeks after the completion of the activity and was a prerequisite to receiving final payment for the extra duty position. The parties agree that the process was basically informal with extra duty incumbents assuming that they would continue in their positions unless they either indicated that they did not desire to do so or the principal or athletic director advised them that they would not be asked to serve again.

ISSUE

Did the District unilaterally alter an mandatory subject of bargaining in violation of 14 DeL.C. §§4007(a)(1), (a)(3) and/or (a)(5), when it adopted changes in the process for selection of personnel for extra duty positions without providing notice to or the opportunity for good faith bargaining to the Association?

POSITIONS OF THE PARTIES

Association:

The Association asserts that the assignment of personnel to extra duty positions is a mandatory subject of bargaining, as it directly affects the teacher's pay, hours, reputation and other conditions of employment. It argues that the "selection" of employees reserved to the exclusive prerogative of the employer at §4005 of the Act is limited to the initial hire of teachers. The Association relies on the balancing test established by the PERB in Appoquinimink Education Association v. Bd. of Education (Del. PERB, U.L.P. 1-3-84-3-2A (8/14/84)) for determining whether a disputed issue qualifies as a mandatory subject of

bargaining. Applying the Appoquinimink test, the Association asserts that the terms and conditions under which a teacher obtains and keeps an extra duty position more directly impact the individual teacher than the school system as a whole and is, therefore, a mandatory subject of bargaining. Because it is a mandatory subject of bargaining, it argues, the District cannot unilaterally change this process without negotiating with the exclusive bargaining representative of the employees.

Further, the Association disputes the District's characterization of the impact of Policy 124 as being administrative rather than substantive. It contends that the new policy implements numerous substantive changes in establishing a window period for reapplication, requiring that applicants waive their rights to challenge the assignment procedure, limiting the considered prior experience to a three year period, introducing a new contracting procedure, and making all extra duty positions open annually.

Finally, the Association argues that extra duty positions are included within and covered by the collective bargaining agreement. It points out that the contract includes salary schedules for extra duty positions and that the District has attempted to negotiate procedures impacting extra duty positions in the past. The Association also asserts that the PERB decision in Cape Henlopen Education Association v. Bd. of Education (U.L.P. No. 90-01-047 (5/22/90)) "has confirmed that removal from extra duty positions is covered by the contract's grievance procedure".

District:

The District contends that Board Policy 124 does not supersede Board Policy 503 and does not amount to either an unlawful change in the collective bargaining agreement or an unfair labor practice. Whereas Policy 503 covers the selection and interviewing of coaching candidates, Policy 124 defines the duration of the employment contract and the reapplication process, and provides a written format to document those matters. It argues that Board policy is

not included within the terms of the collective bargaining agreement except to the extent that it is specifically included within the negotiated contract. Further, the District argues that it has never bargained either the form of the employment contract or the procedure for issuing contracts for extra duty positions.

The District asserts that the Association's charge fails to establish that there has been any change in a mandatory subject of bargaining. The testimony of the Association's witnesses, while reflecting those individuals' beliefs as to their right to continuing employment in extracurricular duties, failed to establish that the District at any time knowingly acquiesced to "tenure" for incumbents in extra duty positions. The District argues that it has always reserved to itself the power to make hiring decisions as to extracurricular positions.

The District argues that decisions concerning the selection and retention of extracurricular personnel clearly constitute selection of personnel, a matter statutorily reserved to the exclusive prerogative of the public school employer at 14 Del.C. §4005. As such, this issue cannot constitute a mandatory subject of bargaining. Further, the District asserts that the balancing test established in the Appoquinimink Education Association v. Bd. of Education (Supra.) has no application where a matter clearly falls within the statutory definition of the employer's exclusive prerogative. In the alternative, the District argues that even if the Appoquinimink test is applied, it is widely recognized that fundamental distinctions exist between regular teaching positions and extracurricular positions. Citing numerous cases from other jurisdictions, the District concludes that the staffing of extracurricular positions is clearly a matter having greater impact on the school system as a whole than on the individual teacher, salary notwithstanding.

OPINION

For the Association to prevail, two questions must be answered in the affirmative. First, does the substance of Policy 124 constitute a mandatory subject of bargaining under the Act, and

secondly, if so, did the District's actions constitute a unilateral change in the status quo as it relates to the substance of Policy 124.

The procedures adopted by the District require School Board approval of all extra duty positions, annual contracts and the formal reapplication annually by all incumbents in extra duty positions. The Association contends that the "selection" of personnel reserved to the exclusive prerogative of the employer (14 Del.C. §4005) is limited to the initial hire of a teacher. This position is unsubstantiated by either history or case law. When read in the context of "selection and direction of personnel", it is clear that the statutory language is broad enough to cover multiple personnel decisions including the assignment of employees to extra duty positions. Further, when "functions and programs of the public school employer, its standards of service....[and] organizational structure" are considered in conjunction with the selection and direction of personnel, it is illogical to conclude that the District does not have the right to control the selection process for extra duty positions within the District. Reapplication procedures, annual contracts and Board approval are central components to the selection process. As such, they are matters of inherent managerial policy. Where, as here, the issue is clearly one of inherent managerial policy, it is unnecessary to apply the balancing test established in Appoquinimink.

Having determined that the selection process for extra duty positions as provided for in Policy 124 is a permissive subject of bargaining, it is unnecessary to consider whether the District made a unilateral change in the status quo, as it has no obligation to bargain those matters reserved its exclusive prerogative. The Association failed to provide support for its contention that an alleged extracontractual status quo is binding on the District in the same manner that a contractual provision dealing with a mandatory subject of bargaining would be. With the sole exception of the inclusion of special duty pay matrices in Appendices IV, V and VI, at no place in the existing agreement are terms and conditions for extracurricular positions referenced. Indeed the language at the bottom of each of the matrices supports the District's

assertion that positions of this type have always been annual in nature, in that it specifically provides: "...If a coach is rehired for a subsequent season, then the coach will be paid at the highest scale" (emphasis added). Further the Association did not request or argue that the applicable posting requirements or assignment process to which the District is bound are those found within the context of the agreement at Article X, Teacher Assignment, and/or Article XI, Posting of Vacancies. Rather the Association has argued that the terms by which the District is bound are those which are established by District policy, of which there is no history of prior bargaining. It is further evident that Policy 124 did not supersede Policy 503, as these policies are not inconsistent but rather deal with different, albeit related, subject matter.

Having determined the selection of extra duty positions to be a permissive subject of bargaining, even if the District chose to bargain in the past, it is not bound to continue to bargain on matters which are reserved to its authority. However, it should be noted that the bargaining history on which the Association relied apparently dealt with the right of the District to unilaterally assign personnel to extra duty positions, an issue which is not before this Board under this charge.

The testimony and argument received in this matter indicates an apparent misunderstanding of this Board's decision in Cape Henlopen Education Association v. Bd. of Education ("Cape 1", Supra.). The issue raised in Cape 1 was whether the District violated the statute by refusing to process a grievance, filed by a teacher and concerning discipline received within the scope of his extracurricular coaching duties, through arbitration as provided for in Article 3 of the collective bargaining agreement. In resolving that matter, the contractual grievance definition was examined relative to that facts of the case in order to determine whether the issue was grievable/arbitrable under the Agreement. The decision reached no further than interpreting the parties' contractual grievance language in resolving the charge.

In deciding questions of arbitrability, it is essential that contract interpretation be limited to determining whether the the disputed matter is included within the scope of grievance and/or arbitration procedure. It is

not the function of the Public Employment Relations Board to proceed further and rule on the merits of the underlying substantive issue by interpreting other contractual provisions. A consideration of the underlying substantive issue involving the alleged violation of Article V, Professional Employee Rights, section 5.2, Just Cause Provision, and the District's defense(s) including reliance on Article I, Recognition, are properly and exclusively within the province of the arbitrator. [at page 517].

The District's defense that the employee was not subject to the grievance procedure because extracurricular duties were not recognized as covered under the Agreement required an interpretation as to the scope of the recognition clause. This issue was left to the arbitrator. This ruling was affirmed in its entirety by the full PERB in its decision on request for review, entered on August 28, 1990. At no point was a ruling made that extracurricular positions are covered by the parties' agreement in the Cape Henlopen School District or in any other Delaware school district.

In conclusion, Policy 124 as adopted by the Cape Henlopen Board of Education, as it relates to the requirement of School Board approval for all extra duty positions, annual contracts and the formal reapplication process by incumbents for extra duty positions, falls within the inherent managerial policy authority of the public school employer as defined at 14 Del.C. §4005. These matters therefore constitute permissive subjects of bargaining on which the District is not obligated to bargain. Having so decided, the Association's charge is hereby dismissed in all counts.

CONCLUSIONS OF LAW

1. The Board of Education of the Cape Henlopen School District is a public school employer within the meaning of §4002(m) of the Public School Employment Relations Act.
2. The Cape Henlopen Education Association is an employee organization within the meaning of §4002(g) of the Act.
3. The Cape Henlopen Education Association is the exclusive bargaining representative of the school district's professional employees within the meaning of §4002(j) of the Act.

4. The provisions of Policy 124, which require School Board approval of extra duty positions, annual contracts and formal reapplication for all extra duty positions, are matters reserved to the exclusive prerogative of the public school employer under 14 Del.C. §4005, and as such constitute permissive subjects of bargaining.

5. The District is under no obligation to negotiate permissive subjects of bargaining.

6. For the reasons stated above, the Association's charge is hereby dismissed.

IT IS SO ORDERED.

Deb. Murray-Sheppard

DEBORAH L. MURRAY-SHEPPARD
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Charles D. Long, Jr.

CHARLES D. LONG, JR.
Executive Director
Delaware Public Employment Relations Bd.

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